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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

DONALD N. MCLEOD et al., Plaintiffs and Appellants, v. RALPHS GROCERY COMPANY, Defendant and Respondent.	B283865, B290482 (Los Angeles County Super. Ct. No. BC321704)

APPEALS from an order of the Superior Court of Los Angeles County. Jane L. Johnson, Judge. Affirmed in part, dismissed in part.

Herzog Yuhas Ehrlich & Ardell, Ian Herzog and Susan Abitanta; Law Offices of Stephen Glick and Stephen Glick; Schonbuch & Lebovits, Paul Fine and Daniels Fine Israel for Plaintiffs and Appellants.

Morrison & Foerster, Miriam A. Vogel, David P. Zins, and Karen J. Kubin for Defendant and Respondent.

In this consolidated appeal, plaintiffs and appellants Randy Champagne (Champagne), Donald M. McLeod (McLeod), Michael Miner (Miner), and Benjamin Mock (Mock)[1] challenge the trial court's order denying their motion for class certification in their action against defendant and respondent Ralphs Grocery Company (Ralphs) for unpaid overtime, violations of Business and Professions Code section 17200, and civil penalties under the Labor Code Private Attorneys General Act of 2004 (Lab. Code, § 2698 et seq.) (PAGA).[2] Plaintiffs sought to certify two classes -- a store manager class represented by Champagne, and a co-manager class represented by McLeod, Miner, and Mock. Champagne appeals the denial of the store managers' class claims. McLeod, Miner, and Mock appeal the denial of the co-managers' class claims.

We dismiss Champagne's appeal for lack of jurisdiction. The order denying certification of a store manager class is a nonappealable order because PAGA claims remained pending at the time Champagne filed his notice of appeal. (*Munoz v. Chipotle Mexican Grill, Inc.* (2015) 238 Cal.App.4th 291, 310.)

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[1] McLeod, Miner, and Mock are sometimes referred to collectively as the co-manager plaintiffs. Champagne and the co-manager plaintiffs are referred to collectively as plaintiffs.

[2] Champagne and Courtney Swanson, a former Ralphs co-manager and putative plaintiff who is no longer a party in this action, asserted individual and representative claims under PAGA.

The death knell doctrine[3] does not apply under these circumstances. (*Ibid.*)

As to the co-manager plaintiffs, we conclude the trial court applied the proper legal criteria in assessing class certification and substantial evidence supports the trial court's findings. The record discloses no abuse of discretion. We therefore affirm the order denying class certification.

BACKGROUND

The parties

Ralphs is a supermarket chain headquartered in Compton, California. During the relevant time period, Ralphs operated more than 320 retail grocery stores, ranging in size from smaller than 10,000 square feet to larger than 85,000 square feet.

Champagne is a former Ralphs store manager.[4] McLeod, Miner, and Mock are former Ralphs co-managers.[5]

Ralphs store managers and co-managers

Each Ralphs store is typically managed by one store manager and one co-manager. The store manager is the highest-level employee in the store and is responsible for managing store personnel and overseeing all aspects of the store's operations.

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[3] As discussed *post,* the death knell doctrine is a judicially created exception to the one final judgment rule that dismisses class claims while allowing individual claims to survive as an appealable order. (*In re Baycol Cases I & II* (2011) 51 Cal.4th 751, 757 (*Baycol*).)

[4] Ralphs store managers were called store directors until 2011.

[5] Ralphs co-managers were called managers of operations until 2009.

The store manager reports to a district manager who is usually not present in the store. Ralphs classifies store managers as overtime-exempt and pays them a salary ranging from $75,000 to more than $130,000 per year.

The co-manager reports to the store manager and shares responsibility with the store manager for managing all aspects of the store. Because the co-manager's and store manager's schedules overlap for only a limited period of time, the co-manager frequently runs the store independently and has primary responsibility for a variety of administrative tasks. Ralphs classifies co-managers as overtime-exempt and pays them salaries ranging from $58,500 to more than $85,000.

The current action and class certification motion

Plaintiffs filed this putative class action on behalf of store managers and co-managers who were employed by Ralphs from September 17, 2000 to the present, claiming that Ralphs misclassifies store managers and co-managers as exempt from overtime wage laws. Plaintiffs Champagne and Swanson also asserted individual and representative claims for civil penalties under PAGA "on behalf of all current and former aggrieved employees."

Plaintiffs filed a motion to certify two classes, a co-manager class and a store manager class, employed by Ralphs during the relevant time period. Plaintiffs also sought to certify two "strike" subclasses, limited to the period corresponding to a labor dispute affecting Ralphs in late 2003 and early 2004. Ralphs opposed the motion.

On February 27, 2015, the trial court issued an order denying class certification, concluding that plaintiffs failed to establish that common, as opposed to individual, issues

predominate and that the class action device is superior to alternative methods of resolving the dispute. The trial court found "substantial, credible evidence that how [the managers] spend their time is highly individualized and that managers and co-managers are given significant discretion in running the store as he or she sees fit." The trial court further found that plaintiffs' theory of recovery -- that Ralphs had a uniform policy of classifying managers as exempt without first examining how they actually spend their time -- standing alone, did not address whether any given employee was properly classified, a determination dependent on an employee's individual circumstances, and did nothing to facilitate common proof on otherwise individualized issues.

Plaintiffs filed a notice of appeal in 2015 challenging the denial of class certification. On December 30, 2015, this court granted Ralphs's motion to dismiss the appeal on the ground that the order denying class certification was not a final appealable order and that the death knell doctrine did not apply because Champagne's and Swanson's PAGA claims were still pending.

After the remittitur was issued, Ralphs filed a motion for summary adjudication of Champagne's PAGA cause of action as barred by the statute of limitations. The trial court granted that motion on May 15, 2017.

On July 14, 2017, Champagne filed a notice of appeal from the order granting summary adjudication of his PAGA claim, "including all evidentiary and other rulings made therein." Champagne's notice of appeal further stated that "[i]nasmuch as the trial court has denied [Champagne's] motion for class certification (on February 27, 2015) and his PAGA action (on May 15, 2017) on behalf of himself and all similarly situated Store

Managers, the 'death knell' doctrine applies, and this appeal is appropriate and timely." On June 5, 2018, Champagne withdrew the "PAGA portion" of his appeal.

On May 23, 2018, the trial court granted Swanson's request to dismiss with prejudice her individual and representative claims, including her PAGA claims. On June 5, 2018, McLeod, Mock, and Miner appealed on behalf of themselves and other co-managers from the February 2015 order denying class certification.

The two appeals were consolidated on July 27, 2018.

DISCUSSION

I. Jurisdiction over Champagne's appeal

We lack jurisdiction to consider Champagne's challenge to the order denying class certification. At the time Champagne filed his notice of appeal, a PAGA cause of action was still pending. The death knell doctrine does not apply in these circumstances, which results in Champagne's appellate challenge to be to a nonappealable order. (*Munoz, supra,* 238 Cal.App.4th at p. 310.)

Under the one final judgment rule, "[a] reviewing court has jurisdiction over a direct appeal only when there is (1) an appealable order or (2) an appealable judgment. [Citations.]" (*Griset v. Fair Political Practices Com.* (2001) 25 Cal.4th 688, 696 (*Griset*).) The death knell doctrine is a judicially created exception to the one final judgment rule that treats an order which dismisses class claims while allowing individual claims to survive, as an appealable order. (*Baycol, supra,* 51 Cal.4th at p. 757; *Cortez v. Doty Bros. Equipment Co.* (2017) 15 Cal.App.5th 1, 8, (*Cortez*).) The doctrine is applicable after consideration of these circumstances: "(1) The order terminating class claims is

the practical equivalent of a final judgment for absent class members; and (2) without the possibility of a group recovery, the plaintiff will lack incentive to pursue claims to final judgment, thus allowing the order terminating class claims to evade review entirely. [Citation.]" (*Cortez*, at p. 8.)

In *Munoz*, Division One of this District held that the "presence of PAGA claims following a trial court's denial of class certification precludes application of the death knell doctrine." (*Munoz, supra*, 238 Cal.App.4th at p. 310.) The *Munoz* court explained that the principle underpinning the death knell doctrine -- the lack of financial incentive to pursue the case to final judgment absent immediate review -- does not apply when the plaintiff retains a representative PAGA claim: "Given the potential for recovery of significant civil penalties if the PAGA claims are successful, as well as attorney fees and costs, plaintiffs have ample financial incentive to pursue the remaining representative claims under the PAGA, and, thereafter, pursue their appeal from the trial court's order denying class certification." (*Id.* at p. 311.)

Numerous other appellate courts have similarly found the death knell doctrine does not apply when a PAGA claim remains pending following termination of class claims. (See, e.g., *Cortez, supra,* 15 Cal.App.5th at pp. 8-9; *Young v. RemX, Inc.* (2016) 2 Cal.App.5th 630, 635-636; *Nguyen v. Applied Medical Resources Corp.* (2016) 4 Cal.App.5th 232, 243; *Miranda v. Anderson Enterprises, Inc.* (2015) 241 Cal.App.4th 196, 201-202.) We find the reasoning of these courts persuasive and apply it here.

At the time Champagne filed his July 14, 2017 notice of appeal, Swanson's representative PAGA claims were still pending and remained pending until May 23, 2018, when the trial court

granted Swanson's request for dismissal of her claims. The death knell doctrine is therefore inapplicable to Champagne's appeal from the order denying store manager class claims. (*Cortez, supra,* 15 Cal.App.5th at pp. 8-9; *Munoz, supra,* 238 Cal.App.4th at p. 310.)

That Champagne's notice of appeal identifies the order summarily adjudicating his PAGA claim as the appealed from order does not alter the result. The appeal from the summary adjudication order was not, as Champagne contends "from a final order . . . disposing of all issues as to the manager class." Absent store manager plaintiffs could still have benefitted from a successful prosecution of Swanson's then pending representative PAGA claims, which were asserted "on behalf of all current and former aggrieved employees." Summary adjudication of Champagne's PAGA claims accordingly did not amount to a de facto final judgment for absent store manager plaintiffs. (*Baycol, supra,* 51 Cal.4th at p. 759.)

Champagne's challenge to the order denying class certification is from a nonappealable order. (*Munoz, supra,* 238 Cal.App.4th at pp. 311-312.) We dismiss his appeal for lack of jurisdiction.[6] (*Griset, supra,* 25 Cal.4th at p. 696.)

Our review of the order denying class certification is accordingly limited to the claims of the co-manager plaintiffs.

II. Overtime exemptions at issue

The Labor Code generally requires overtime pay for employees who work more than 40 hours in a given workweek.

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[6] If this court had jurisdiction to consider the merits of Champagne's appeal, we would affirm the order denying store manager class claims for the same reasons we affirm the denial of co-manager claims.

(Lab. Code, § 510, subd. (a); *Sav-On Drug Stores, Inc. v. Superior Court* (2004) 34 Cal.4th 319, 324.) Certain employees, however, are exempt from overtime pay requirements under regulations promulgated by the Industrial Welfare Commission (IWC). (Lab. Code, § 515, subd. (a).) As applicable here, IWC Wage Order No. 7-2001 (Cal. Code Regs., tit. 8, § 11070 (Wage Order 7-2001)), exempts certain administrative and executive employees in the mercantile industry.[7]

Under Wage Order 7-2001, an exempt executive employee must (1) be involved in managing the enterprise or a customarily recognized department or subdivision of it; (2) customarily and regularly direct the work of two or more employees; (3) have authority to hire or fire, or have particular weight given to the executive employee's suggestions and recommendations regarding hiring, firing, advancement, and promotion, or any other employment status change; (4) customarily and regularly exercise discretion and independent judgment; (5) be primarily engaged in duties meeting the test of the exemption; and (6) earn a salary of at least twice the minimum wage. (Wage Order 7-2001, subd. (1)(A)(1).)

An exempt administrative employee must (1) be involved in the performance of office or non-manual work directly related to management policies of the employer or the employer's customers; (2) customarily and regularly exercise discretion and independent judgment; (3) do one of the following: (a) regularly

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[7] Mercantile industry is defined as "any industry, business, or establishment operated for the purpose of purchasing, selling, or distributing goods or commodities at wholesale or retail; or for the purpose of renting goods or commodities." (Wage Order 7-2001, subd. (2)(H).)

and directly assist a proprietor or an exempt executive or administrative employee, (b) perform, under only general supervision, specialized or technical work requiring special training, experience, or knowledge, or (c) execute, under only general supervision, special assignments and tasks; (4) be primarily engaged in duties meeting the test of the exemption; and (5) earn a salary of at least twice the minimum wage. (Wage Order 7-2001, subd. (1)(A)(2).)

To be primarily engaged in duties meeting the test of the exemption means spending more than one-half of the employee's worktime performing exempt duties. (Lab. Code, § 515, subd. (e); Wage Order 7-2001, subd. (2)(K).) To determine whether an employee is primarily engaged in exempt duties, a court must examine the work actually performed during the workweek and the amount of time the employee spends on such work, together with the employer's realistic expectations and the realistic requirements of the job. (Wage Order 7-2001, subd. (1)(A)(1)(e); *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785, 802 (*Ramirez*).)

Exemptions from statutory overtime requirements are narrowly construed, and the employer bears the burden of proving that an exemption applies. (*Ramirez, supra,* 20 Cal.4th at pp. 794-795.)

III. Class actions: applicable law and standard of review

"The party advocating class treatment must demonstrate the existence of an ascertainable and sufficiently numerous class, a well-defined community of interest, and substantial benefits from certification that render proceeding as a class superior to the alternatives. [Citations.] 'In turn, the "community of interest requirement embodies three factors: (1) predominant common

questions of law or fact; (2) class representatives with claims or defenses typical of the class; and (3) class representatives who can adequately represent the class.'" [Citations.]" (*Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1021 (*Brinker*).)

The elements of class suitability at issue in this appeal are whether common questions of law or fact predominate and whether class treatment would be superior to alternative methods of resolution.

Predominance is a factual question, and the trial court's finding that common issues do or do not predominate is reviewed for substantial evidence. (*Brinker, supra*, 53 Cal.4th at p. 1022.) The relevant inquiry "is whether 'the issues which may be jointly tried, when compared with those requiring separate adjudication, are so numerous or substantial that the maintenance of a class action would be advantageous to the judicial process and to the litigants.' [Citations.] The answer hinges on 'whether the theory of recovery advanced by the proponents of certification is, as an analytical matter, likely to prove amenable to class treatment.' [Citation.] . . . 'As a general rule if the defendant's liability can be determined by facts common to all members of the class, a class will be certified even if the members must individually prove their damages.' [Citations.]" (*Id.* at pp. 1021-1022, fn. omitted.) Class treatment is not appropriate "'if every member of the alleged class would be required to litigate numerous and substantial questions determining his individual right to recover following the "class judgment"' on common issues. [Citation.]" (*Duran v. U.S. Bank National Assn.* (2014) 59 Cal.4th 1, 28 (*Duran*).)

"On review of a class certification order, an appellate court's inquiry is narrowly circumscribed. 'The decision to certify a class rests squarely within the discretion of the trial court, and we afford that decision great deference on appeal, reversing only for a manifest abuse of discretion: "Because trial courts are ideally situated to evaluate the efficiencies and practicalities of permitting group action, they are afforded great discretion in granting or denying certification." [Citation.] A certification order generally will not be disturbed unless (1) it is unsupported by substantial evidence, (2) it rests on improper criteria, or (3) it rests on erroneous legal assumptions. [Citations.]' [Citations.]" (*Brinker, supra,* 53 Cal.4th at p. 1022.)

"'"Ordinarily, appellate review is not concerned with the trial court's reasoning but only with whether the result was correct or incorrect. [Citation.] But on appeal from the denial of class certification, we review the reasons given by the trial court for denial of class certification, and ignore any unexpressed grounds that might support denial. [Citation.] We may not reverse, however, simply because *some* of the court's reasoning was faulty, so long as *any* of the stated reasons are sufficient to justify the order. [Citation.]" [Citation.] Any valid, pertinent reason will be sufficient to uphold the trial court's order.' [Citation.]" (*Cruz v. Sun World Internat., LLC* (2015) 243 Cal.App.4th 367, 373.)

IV. Predominance of individual versus common issues

Substantial evidence supports the trial court's conclusion that individualized issues, not common ones, would predominate in determining Ralphs's liability. The evidence, which included plaintiffs' own deposition testimony, declarations and deposition testimony by Ralphs's corporate managers, and declarations by

58 Ralphs co-managers and store managers, show that Ralphs managers perform myriad tasks that vary from store to store, time of day, time of year, and numerous other variables.

A. Evidence of variable store operations

There was evidence that Ralphs stores vary in age, size, configuration, sales volume, and customer traffic, and that these differences affect how store managers and co-managers perform their jobs. The evidence also showed that Ralphs periodically opens new stores, and remodels or closes existing stores, requiring store managers and co-managers at those stores to perform specific tasks unique to those activities. These tasks can include large-scale hiring at new or expanding stores, winding up a closing store's operations, and coordinating with construction teams in planning store sections and layouts.

B. Evidence of location-specific variables

There was evidence that Ralphs stores are in varying geographic locations, ranging from downtown urban locations to outlying areas, and that factors unique to a store's location affect how managers perform their jobs. These variable geographic factors include seasonal business fluctuations, the presence or absence of nearby competitor stores, and customer demographics.

C. Evidence of variable management and workforce influences

There was evidence that managers' jobs vary depending on with whom they work. A district manager's management style affects a store manager's job. Similarly, a store manager's individual management style affects the tasks he or she performs and those delegated to a co-manager.

The size of Ralphs's hourly workforce varies from store to store, ranging from fewer than 20 to 200 or more, which impacts the tasks that a store manager and co-manager performs.

D. Plaintiffs' evidence of a uniform classification policy

Plaintiffs ignore the foregoing evidence and focus instead on evidence supporting their theory of recovery -- that Ralphs had a policy of classifying its managers as overtime-exempt without first examining the work managers actually perform on a time and task basis. Plaintiffs contend Ralphs's uniform classification policy violates Wage Order 7-2001 and "mandates class certification because common issues as to that theory predominate."

That contention has been rejected by the California Supreme Court. In *Duran*, the Supreme Court stated: "In wage and hour cases where a party seeks class certification based on allegations that the employer consistently imposed a uniform policy or de facto practice on class members, the party must still demonstrate that the illegal effects of this conduct can be proven efficiently and manageably within a class setting. [Citations.]" (*Duran, supra*, 59 Cal.4th at p. 29.) The court in *Duran* went on to note that "the uniform application of an exemption, standing alone, 'does nothing to facilitate common proof on the otherwise individualized issues.' [Citation.]" (*Id.* at p. 32, fn. 29, quoting *In re Wells Fargo Home Mortgage Overtime Pay Litigation* (9th Cir. 2009) 571 F.3d 953, 959.)

Appellate courts have consistently followed the principles articulated in *Duran* to class claims asserted by employees allegedly misclassified as exempt based solely on uniform job descriptions or employer policies. For example, the court in *Mies*

v. Sephora U.S.A., Inc. (2015) 234 Cal.App.4th 967 (*Mies*) affirmed an order denying a class certification motion by a putative plaintiff who claimed the employer misclassified store "Specialists" as exempt executives or administrators based solely on standardized job descriptions. (*Id.* at p. 972.) The court in *Mies* concluded that "the mere fact [the employer] has common policies applicable to all employees, including Specialists, cannot, alone, compel class certification. . . . To the contrary, 'courts have routinely concluded that an individualized inquiry is necessary even where the alleged misclassification involves application of a uniform policy. . . .' [Citation.]" (*Id.* at pp. 983-984.)

Similarly, in *Mora v. Big Lots Stores, Inc.* (2011) 194 Cal.App.4th 496, the court affirmed an order denying class certification to putative plaintiffs who claimed the employer misclassified store managers as exempt based solely on their job description, ignoring their actual work performed. The court in *Mora* concluded the misclassification issue was not susceptible to common proof because the evidence showed wide store-to-store variation in types of work performed and amounts of time spent by managers on different activities. (*Id.* at pp. 508-509.) Other appellate decisions are in accord. (*Arenas v. El Torito Restaurants, Inc.* (2010) 183 Cal.App.4th 723, 734 [theory of recovery that managers were misclassified as overtime-exempt based solely on their job descriptions was not amenable to common proof when evidence showed managers' duties and time spent on individual tasks varied widely from one location to another]; *Walsh v. IKON Office Solutions, Inc.* (2007) 148 Cal.App.4th 1440, 1461-1462; see also *Dunbar v. Albertson's, Inc.* (2006) 141 Cal.App.4th 1422, 1431 [commonality lacking given

"significant variation in grocery store managers' work from store to store and week to week"].)

Martinez v. Joe's Crab Shack Holdings (2014) 231 Cal.App.4th 362 (*Martinez*), on which plaintiffs rely to support their class certification argument, is distinguishable. In *Martinez*, 182 managers (including general managers and several types of assistant managers) at 13 California "Joe's Crab Shack" eateries sought class treatment in an overtime case. (*Id.* at pp. 369-371 & fn. 4.) According to the *Martinez* plaintiffs, "[w]hat was common to [the manager] plaintiffs, in addition to . . . standard policies implemented . . . at each of their restaurants, was their assertions their tasks did not change once they became managers; they performed a utility function and routinely filled in for hourly workers in performing nonexempt tasks; and they worked far in excess of 40 hours per week without being paid overtime wages." (*Id.* at p. 376.) Thus, a central issue presented in *Martinez* was "whether a typically nonexempt task becomes exempt when performed by a managerial employee charged with supervision of other employees." (*Id.* at p. 381, fn. omitted.) That issue is not present here. Rather, the relevant question is whether the myriad tasks performed by store managers and co-managers in different stores and at different times are subject to common proof.

The other cases cited by plaintiffs are equally distinguishable. (See *Brinker, supra,* 53 Cal.4th 1004; *Hall v. Rite Aid Corp.* (2014) 226 Cal.App.4th 278 (*Hall*); *Benton v. Telecom Network Specialists, Inc.* (2013) 220 Cal.App.4th 701 (*Benton*); *Bradley v. Networkers Internat., LLC* (2012) 211 Cal.App.4th 1129 (*Bradley*).) None of those cases involve the alleged misclassification of employees as overtime-exempt or

whether putative class members were primarily engaged in exempt duties. Rather, the cases concern class claims by nonexempt employees allegedly denied meal and rest breaks or other accommodations to which they were statutorily entitled. (*Brinker* [failure to provide meal and rest breaks]; *Hall* [failure to provide suitable seats for cashiers]; *Benton* [failure to provide meal and rest breaks]; *Bradley* [lack of a meal and rest break policy].)

Plaintiffs' theory of recovery, premised on the existence of a uniform policy that violates Wage Order 7-2001, is insufficient to compel class certification given the evidence of the widely varying duties performed by store managers and co-managers. (*Duran, supra,* 59 Cal.4th at pp. 29, 32; *Mies, supra,* 234 Cal.App.4th at p. 984.) The existence of a uniform policy does not determine whether any given store manager or co-manager was improperly classified as overtime-exempt. That determination, the evidence shows, depends on the manager's individual circumstances.

The trial court did not abuse its discretion by denying the motion for class certification.

DISPOSITION

Champagne's appeal is dismissed. The order denying class certification is affirmed. Ralphs shall recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.
GILBERT